Ketua Pengarah Hasil Dalam Negeri v Shiuh Dong Industries Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R4–14–02 OF 2010
MOHD ZAWAWI J
5 JULY 2011

Revenue Law — Income tax — Deduction — Whether taxpayer who used agent to import trade goods could claim double deduction on cargo insurance paid by agent — Whether word 'importer' under r 2 of the Income Tax (Deductions of Insurance Premiums for Importers) Rules 1982 included taxpayer who imported trade goods using agent — Whether interest paid on loan to acquire land for business factory deductible under s 33(1)(a)(ii) of the Income Tax Act 1967 — Whether factory produced gross income of taxpayer's business during relevant period of assessment

The respondent company ('SDI') used its sister company, HSH, as its agent to import trade goods ('SDI goods') from overseas suppliers. Under the arrangement between the companies, inter alia, SDI goods were at all times SDI's property, the marine insurance premium paid by HSH for their import was done on SDI's behalf as the beneficiary under the policy and SDI was to reimburse HSH for all lawful expenses incurred by HSH on its behalf. Within a year of starting business, SDI bought land to construct a factory. Although the construction was completed in 1998, commissioning of machinery to operate the factory only took place in the years 2001/2002. The Director-General of Inland Revenue ('DGIR') disallowed (i) SDI's claim for double deduction on insurance premium paid for the import of SDI goods for the years of assessment 1997, 1998 and 1999 under the Income Tax (Deductions of Insurance Premiums for Importers) Rules 1982 and (ii) SDI's claim that the interest it paid on a credit facility to acquire land and build a factory was deductible under s 33(1)(a)(ii) of the Income Tax Act 1967 ('the Act') as it was expenditure on a source that produced SDI's gross income. In disallowing both claims the DGIR issued notices of additional tax payable by SDI together with a 60% penalty under s 113(2) of the Act. The Special Commissioners of Income Tax ('SCIT') decided that SDI was entitled to the double deduction claimed in respect of the insurance premium and that the penalty imposed in respect of that matter was wrong ('the first decision'). With regard to SDI's claim for deduction of the interest expenditure, the SCIT decided the deduction was not allowable under s 33(1)(a)(ii) of the Act and, accordingly, the penalty imposed in that matter was correct ('the second

decision'). By way of case stated, the DGIR appealed to the High Court against the first decision while SDI appealed against the second decision.

Held, dismissing both appeals and affirming the SCIT's decisions:

(1) The definitions of the word 'importer' in Black's Law Dictionary and under s 2 of the Customs Act 1967 spoke of the general concept of bringing goods into a country. The word was wide enough to include a taxpayer who imported trade goods using an agent. There was no reason to limit r 2 of the Income Tax (Deductions of Insurance Premiums for Importers) Rules 1982 to the person who actually imported the goods such as HSH. SDI was the efficient cause of the importation and was therefore the importer within r 2 and, hence, it was entitled for a double deduction. The DGIR had no right to impose the penalty against SDI (see paras 10–11 & 15).

(2) The SCIT was correct when they based their findings on the fact the goods imported were at all material times beneficially owned by SDI and that HSH did not claim any deduction for the costs of the goods imported or their marine insurance premium. In addition, the DGIR had himself allowed a single deduction under s 33(1) of the Act on the marine insurance (see para 14).

(3) Before the interest paid by SDI could be considered as expenditure under s 33 of the Act, the land and the factory must have been used or held to produce the gross income of SDI's business for the year ending 31 March 1997 and 31 March 1998. However, the facts showed that during both those periods the land and the building/factory were still not in use for SDI's business purposes. The building/factory was still under construction and no exact date was given when the building first started to operate as a factory (see paras 19 & 20).

[Bahasa Malaysia summary

Responden syarikat ('SDI') menggunakan syarikat sekutunya, HSH, sebagai ejen untuk mengimport barang-barang dagangan ('barangan SDI') daripada pembekal luar negara. Menurut percaturan antara kedua-dua syarikat, antara lain, barangan SDI adalah pada setiap masa, hak milik SDI, premium insurans marin dibayar oleh HSH untuk import mereka dibuat bagi pihak SDI ini sebagai benefisiari di bawah polisi ini dan SDI perlu membayar balik HSH bagi semua perbelanjaan sah yang ditanggung oleh HSH bagi pihaknya. Dalam setahun apabila baru memulakan perniagaan, SDI membeli tanah untuk membina sebuah kilang. Walaupun pembinaan telah siap pada tahun 1998, pentauliahan jentera untuk mengendalikan kilang hanya berlaku pada tahun 2001/2002. Ketua Pengarah Hasil Dalam Negeri ('KPHDN') menolak (i) tuntutan SDI untuk potongan dua kali ganda ke atas premium insurans yang dibayar untuk import barangan SDI bagi tahun-tahun taksiran 1997, 1998

dan 1999 di bawah Kaedah-Kaedah Cukai Pendapatan (Potongan Premium Insurans bagi Pengimport) 1982 ('Kaedah-Kaedah') dan (ii) tuntutan SDI bahawa faedah yang dibayar dengan kemudahan kredit untuk memperoleh tanah dan membina sebuah kilang ditolak di bawah s 33(1)(a)(ii) Akta Cukai Pendapatan 1967 ('Akta') kerana ia adalah perbelanjaan pada sumber yang menghasilkan pendapatan kasar SDI. Dalam menolak kedua-dua tuntutan KPHDN mengeluarkan notis cukai tambahan terbayar oleh SDI bersama-sama dengan penalti 60% di bawah s 113(2) Akta. Pesuruhjaya Khas Cukai Pendapatan ('PKCP') memutuskan bahawa SDI layak untuk potongan dua kali ganda yang dituntut dalam premium insurans berkenaan dan bahawa penalti yang dikenakan berhubung perkara tersebut adalah salah ('keputusan pertama'). Berhubung dengan tuntutan SDI bagi potongan perbelanjaan faedah, PKCP memutuskan potongan tidak dibenarkan di bawah s 33(1)(a)(ii) Akta dan, sewajarnya, penalti yang dikenakan dalam perkara tersebut adalah betul ('keputusan kedua'). Berdasarkan kes yang dinyatakan, KPHDN merayu kepada Mahkamah Tinggi terhadap keputusan pertama manakala SDI merayu terhadap keputusan kedua.

Diputuskan, menolak kedua-dua rayuan dan mengesahkan keputusan PKCP:

(1) Takrif 'pengimport' perkataan dalam Black's Law Dictionary dan di bawah s 2 Akta Kastam 1967 memperuntukkan konsep umum membawa barang-barang ke dalam negara. Perkataan tersebut adalah cukup luas untuk merangkumi pembayar cukai yang mengimport barangan perdagangan menggunakan ejen. Tiada sebab untuk menghadkan A 2 Kaedah-Kaedah ke atas orang yang sebenarnya mengimport barangan seperti HSH. SDI adalah sumber pengimportan yang efisyen dan dengan itu, merupakan pengimport dalam A 2 dan, dengan itu, adalah layak untuk potongan dua kali ganda. KPHDN tidak mempunyai hak untuk mengenakan penalti terhadap SDI (lihat perenggan 10–11 & 15).

(2) PKCP adalah betul apabila mereka membuat penemuan mereka berdasarkan fakta barang-barang yang diimport pada semua masa material, dimiliki secara benefisial oleh SDI dan HSH tidak menuntut sebarang potongan untuk kos barang-barang yang diimport atau premium insurans marin mereka. Di samping itu, KPHDN telah membenarkan dirinya akan potongan sekali di bawah s 33(1) Akta mengenai insurans marin (lihat perenggan 14).

(3) Sebelum faedah yang dibayar oleh SDI boleh dianggap sebagai perbelanjaan di bawah s 33 Akta, tanah dan kilang mesti telah digunakan atau dipegang untuk menghasilkan pendapatan kasar perniagaan SDI tersebut bagi tahun berakhir pada 31 Mac 1997 dan 31 Mac 1998. Walau bagaimanapun, fakta-fakta menunjukkan bahawa semasa kedua-dua tempoh, tanah dan bangunan/kilang masih tidak digunakan untuk

tujuan perniagaan SDI. Bangunan/kilang masih dalam pembinaan dan tiada tarikh yang tepat telah diberikan apabila bangunan tersebut mula beroperasi sebagai sebuah kilang (lihat perenggan 19 & 20).]

Notes

For cases on deduction, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2500–2543.

Cases referred to

MP Holdings Sdn Bhd v KPHDN (2000) MSTC 3 (refd)

Legislation referred to

Companies Act 1965
Customs Act 1967 s 2
Income Tax Act 1967 ss 33, 33(1), (1)(a)(ii), 113(2), Schedule 5 para 34
Income Tax (Deductions of Insurance Premiums for Importers) Rules 1982 r 2

Nor Kamaliah (Inland Revenue Board) for the appellant.
Vijey M Krishnan (FS Kok with him) (Raja Darryl & Loh) for the respondent.

Mohd Zawawi J:

INTRODUCTION

[1] There are two appeals before this court. Both are by way of case stated (CS) pursuant to para 34 of Schedule 5 of the Income Tax Act 1967 ('the Act').

[2] The first appeal is from the director general of inland revenue ('the revenue') which relates to a portion of the deciding order dated 14 July 2009 ('deciding order') where the Special Commissioner of Income Tax ('SCIT') decided as follows:

> ADALAH DIPUTUSKAN bahawa Perayu berhak mendapat potongan tambahan di atas premium insurans yang dibayar bagi tahun-tahun taksiran 1997, 1998 dan 1999 masing-masing berjumlah RM30,858-00, RM19,900-00 dan RM21,446-00 di bawah peruntukan Kaedah-Kaedah Cukai Pendapatan (Potongan Premium Insurans bagi Pengimport) 1982 dan penalti yang dikenakan berkaitan dengan perkara ini mengikut peruntukan seksyen 113(2) Akta Cukai Pendapatan 1967 hendaklah ditarik balik.

[3] The second appeal is from Shiuh Dong Industries Sdn Bhd, the taxpayer ('SDI') which concerns the other portion of the deciding order which reads as follows:

JUGA ADALAH DIPUTUSKAN bahawa perbelanjaan faedah berjumlah RM87,343-00 dan RM 152,450-00 yang dilakukan oleh Perayu masing-masing bagi tahun-tahun taksiran 1998 dan 1999 adalah perbelanjaan yang tidak dibenarkan penolakan di bawah peruntukan seksyen 33(1)(a)(ii) Akta Cukai Pendapatan 1967 dan penalti yang dikenakan berkaitan dengan perkara ini mengikut peruntukan seksyen 113(2) Akta yang sama adalah dikekalkan.

ISSUES FOR DETERMINATION

[4] The issues formulated for determination before SCIT and now before this court are as follows:

(a) whether the revenue is correct in disallowing a double deduction in respect of insurance premium paid for the import cargo insured with a Malaysian incorporated insurance company for the years of assessment 1997–1999 amounting RM30,858, RM19,900 and RM21,446 respectively, claimed by SDI under the Income Tax (Deductions of Insurance Premiums for Importers) Rules 1982;

(b) whether the revenue is correct in imposing a penalty under s 113(2) of the Act for the years of assessment 1997–1999 at rate of 60% with respect to the disallowance referred to in para (i);
(the above said two issues are classified and collectively referred as 'issues on double deduction');

(c) whether interest expenditure of RM87,343 and RM152,450 which were incurred by SDI in the years of assessment 1998–1999 respectively, were incurred for the production of gross income from an existing source and are thereby deductible under s 33(1)(a)(ii) of the Act; and

(d) whether the revenue is correct in imposing a penalty under s 113(2) of the Act for the years of assessment 1998 and 1999 at rate of 60% with respect to the matter described in para (iii)
(these two issues are classified and collectively referred as 'issues on interest expenditure').

FACTS PROVED OR ADMITTED BEFORE THE SCIT

[5] Based on the evidence adduced before the SCIT, the following oral and documentary facts were admitted or proved. For ease of reference, is appropriate that I reproduce them in full:

(a) SDI is a private limited company and was incorporated under the provisions of the Companies Act 1965 on 3 January 1992;

(b) SDI commenced business in the year 1995;

(c) for the financial years 1996 to 2000, it is stated in the audited accounts of SDI that 'The Company is principally engaged in the business of trading in galvanized iron steel sheet;

(d) SDI and one Heap Sing Huat Metal & Machinery Sdn Bhd ('HSH') a private limited company incorporated under the provisions of the Companies Act 1965, are related companies whereby all the shareholders of HSH are also all the shareholders of SDI;

(e) HSH trades in different products from SDI and would not import or order the goods referred to in paras 5.6–5.8 below if not for the arrangement described in the following paras 5.6–5.8;

(f) purely in order to utilise a letter of credit facility that has been granted by Standard Chartered to HSH, SDI has been using HSH to import trade goods required by SDI ('SDI Goods') from overseas suppliers;

(g) the SDI Goods are ordered by SDI directly from the overseas suppliers;

(h) HSH does not consider the SDI Goods to be owned by it and instead considers the SDI Goods to be at all times the property of SDI:

(i) the sums referred to para 4(i) of the issues for determination relates to marine insurance premium on the SDI Goods paid to a Malaysian incorporated insurance company. Whilst the insurance has been obtained by HSH, HSH does not consider itself to be the beneficiary under the policy and is under an obligation to and will forward any claims received under the policy to SDI (if any);

(j) HSH does not account for or recognise in its financial records and audited accounts any expenditure or cost for the purchase of the SDI Goods or the marine insurance premium as it considers such expenditure the expenditure of SDI;

(k) HSH is reimbursed by SDI at cost (with no mark-up) for the purchase price of the SDI Goods as well as marine insurance premium. The exact figure for reimbursement is notified regularly by HSH to SDI via debit notes issued. Consistent with para k above, the debit notes in question state that the reimbursement is on account of payment having been made by HSH on behalf of SDI. HSH does not account for or recognise in its financial books and audited accounts and reimbursement for the purchase of the SDI Goods or the marine insurance premium;

(l) consistent with para k above, other documents pertaining to the import of the SDI Goods such as the Malaysian customs declaration form, bill of lading, packing list and invoice will state SDI as owner or consignee;

(m) whilst HSH has insurable interest in the goods, the SDI Goods are beneficially owned by SDI at all times and HSH does not claim any proprietary rights whatsoever over the SDI Goods;

(n) the interest referred to para 4(iii) of the issues for determination which was incurred by SDI in the years of assessment 1998–1999 respectively in relation to a loan for the acquisition of a piece of land and construction for a building thereon;

(o) the interest referred to para 4(iii) of the issues for determination will be deductible under s 33(1)(a)(ii) of the Act if it was incurred for the production of gross income from an existing source;

(p) there was no exact date given when was the building first started to operate as factory. No evidence adduced to confirm when the factory was commenced its operation;

(q) based on the accounts from Year Ended 31 March 1996 to 31 March 2000, it was stated in the director's report that the principal activity of SDI is engaged in the business of trading in galvanised iron steel and there have been no significant changes in the nature of this activity during that year;

(r) as confirmed by AW1, before the factory started to operate, SDI took orders from customers, sent it to their sister company to cut it according to the specific requirements given by the customers and delivered it to their respective customers;

(s) only after the factory started to operate around year 2000 and 2001, SDI is involved in manufacturing of galvanised iron steel sheet. They take order from customers cut it according to the requirements and deliver it direct to the customers;

(t) the amount referred in para 4(iii) of the issues for determination is a trade debt that was reasonably estimated in all circumstances to be wholly irrecoverable at the end of the basis period for the year of assessment 2000 (current year basis);

(u) the revenue had via a notice of additional assessment (Form JA) for the year of assessment 1997 dated 10 September 2003, a letter dated 10 August 2003 and tax computations as set out in the letter dated 10 August 2003:

(i) assessed SDI to additional tax of RM10,499.40 as a result of, inter alia, disallowing the double deduction referred to in para 4(i) of the issues for determination; and

(ii) imposed a penalty under s 113(2) of the Act at the rate of 60%;

(v) the revenue had via a notice of additional assessment (Form JA) for the year of assessment 1998 dated 10 September 2003, a letter dated 10

August 2003 and tax computations as set out in the letter dated 10 August 2003:

(a) assessed SDI to income tax of RM62,857.48 as a result of, inter alia, disallowing the amounts described in para 4(i) and (iii) of the issues for determination; and

(b) imposed a penalty under s 113(2) of the Act at the rate of 60%.

(w) the revenue had via a notice of additional assessment (Form JA) for the year of assessment 1999 dated 10 September 2003, a letter dated 10 August 2003 and a tax computations as set out in the letter dated 10 August 2003:

(i) assessed that SDI to additional income tax of RM40,515.16 as a result of, inter alia, disallowing the amounts described in para 4(i) and (iii) of the issues for determination; and

(ii) imposed a penalty under s 113(2) of the Act at the rate of 60%.

(x) the reason why HSH's letter of credit was used was because at that point of time, SDI was not an established company and did not have a letter of credit facility. HSH's letter of credit was used only when a letter of credit was required by the overseas supplier and that today, the whole arrangement is no longer in use as SDI is now an established company with its own letter of credit facility;

(y) the insurer knew about the arrangement above and had no issue with it. Based on AW1's testimony, if there is a claim on the policy, HSH will be paid by the insurer and HSH will then pass on the same to SDI;

(z) there was absolutely no risk that HSH would refuse to hand over any insurance proceeds received to SDI as both companies were managed by AW1 and both companies have the same shareholders. By this same reason, it would be strange for the arrangement to be reduced into a formal written contract;

(aa) HSH acts as an agent of SDI in the import of the SDI Goods whereby (1) HSH acts on the instructions of SDI and represents SDI in dealings with suppliers; (2) neither SDI nor HSH considers HSH to be liable under any contract with the supplier since it is SDI as principal that has to be liable to the suppliers; (3) SDI will reimburse HSH for all lawful expenses incurred by HSH on behalf of SDI; (4) HSH views SDI as being bound by any contract that HSH enters into on behalf of SDI and (5) there are times when it is a disclosed agency and there are times when it is an undisclosed agency;

(ab) the SDI Goods are at all material times beneficially owned by SDI. HSH

does not claim any deduction for the cost of the SDI Goods or marine insurance premium. The marine insurance is incurred by SDI (it has a legal obligation to pay the same);

(ac) a single deduction for the marine insurance is not disputed by the revenue (since clearly the tests under s 33(1) are made out);

(ad) the marine insurance is payable to a locally incorporated insurance company for insurance on import of cargo, as is required under the double deduction order;

(ae) in both HSH's and SDI's line, one cannot just import and sell the product as is. The products come in big coils which are minimum five tonnes. Commonly, customers require the product in various small sizes ranging from 5–50 kgs per piece. One cannot trade in these products without cutting it to size. You either cut it yourself or subcontract the cutting or even both;

(af) there is no such thing as a pure trade in this line. If one were to import to sell to a company like HSH or SDI, they would not buy the products as they can buy directly from the supplier at cheaper rates;

(ag) it has always been the intention for SDI to have its own building and machinery for cutting. When SDI started in 1995, it did not want to invest immediately in a building and machinery. HSH sells a different product and so SDI's business is a new one. Since HSH had cutting machinery, SDI subcontracted cutting work to them. This however is not a long term solution since HSH has its own business and cannot be expected to give priority to SDI's work. There is also the issue of capacity as HSH cannot be expected to buy more machinery to cut the SDI's products;

(ah) at the time SDI commenced business, there was no one around that would offer cutting services to SDI since everyone's capacity was full. HSH would offer SDI such services since they are SDI's sister company but this was clearly putting a strain on their activities. This shows that the intention all along was for SDI to have its own cutting capability;

(ai) within one year, that is by 1996, SDI was quite comfortable that its business could succeed and decided to implement the plan to buy land, construct a building and equip the building. They found an ideal location in Bukit Permatang Sena and signed the sale and purchase agreement. In 1996, there were earthworks. Construction started in 1997 and was completed in 1998;

(aj) the financial climate by 1998 was very bad. SDI had intended to commission machinery in 1998 but had to defer this. In the meantime, the building was used as their office;

(ak) it also took SDI a while to find the machinery as they wanted second hand machinery. New machinery would be too expensive. SDI commissioned machinery around 2001/2002 and this was SDI started doing their own cutting. The premises are used for storage of the bulk items purchased and the cutting machinery being used;

(al) even today, SDI still uses HSH for subcontract cutting in some instances. This is usually where SDI has insufficient capacity;

(am) if not for the 1998 crisis, SDI would have had the machinery up and running much sooner; and

(an) the land and building are not for investment. It is solely for SDI's business of selling products at sizes requested by the customer. The building was constructed to SDI's specification. This was not an investment for resale and it was a special purpose building that no one else would want to buy unless they are exactly the same industry.

FINDINGS OF THE COURT

Issues on double deduction

[6] In order to determine whether SDI is entitled for a double deduction, the question of whether SDI was the importer within the ambit of r 2 of the Income Tax Act 1967 — Income Tax (Deductions of Insurance Premiums for Importers) Rules 1982 (PU (A) 72) ('r 2') has to be ascertained.

[7] For convenience, r 2 is reproduced herein:

> 2(1) For the purposes of ascertaining the adjusted income of a person from a business under the Act, there shall be allowed a deduction any premium of a kind allowable under section 33 of the Act payable in respect of insurance of cargo *imported by that person* provided the risks are insured with any insurance company incorporated in Malaysia.
>
> (2) The deduction under these Rules shall be in addition to any deduction allowable under s 33(1) of the Act. (Emphasis added.)

[8] It is noted that the word 'importer' is nowhere defined under r 2 neither in the Act. So this means, the Parliament intended for the ordinary meaning of these words to apply.

[9] It is trite that in the absence of any definition of the intended meaning of words or terms used in a legislative act, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.

[10] According to the *Black's Law Dictionary*, 'importer' is a person or entity that brings goods into a country from a foreign country and pays customs duties. Section 2 of the Customs Act 1967 (Revised 1980) defines the word 'importer' as includes and applies to any owner or other person for the time being possessed of or beneficially interested in any goods at and from the time of importation thereof until such goods are duly removed from customs control.

[11] The definitions speak of the general concept of bringing goods into a country. The word is wide enough to include a taxpayer who imports the trade goods using an agent. There is no reason for limiting r 2 to the person who actually imported the goods such as HSH.

[12] Learned counsel for the revenue submitted that it was HSH who brought the goods into Malaysia from a foreign country and paid customs duties. Eventhough SDI and HSH are related companies, it does not change the fact that each of them has separate legal entity.

[13] The revenue's contention, in my considered view, is untenable. To say that, it would impede the objective of the rule which is introduced to promote cargo insurance with an insurance company incorporated in Malaysia.

[14] This court is concerned with matters of substance, not of form. When the goods are brought from another country to our country, the extent of its immunity from taxation turns on the essential nature of the transaction between the parties and not on the formalities with which the importation is conducted or on the technical procedures by which it is effected.

[15] The SCIT was correct when they based their findings on the fact that the goods imported were at all material time beneficially owned by SDI and HSH did not, at any time, claim any deduction for the costs of the goods imported or marine insurance premium. In addition to that, the revenue themselves had, however, allowed a single deduction under s 33(1) of the Act on the marine insurance.

[16] In my judgment, what is important, the goods were imported and SDI was the efficient cause of its importation. Being that so, SDI was the importer within the ambit of r 2 and hence, entitled for a double deduction under r 2. With respect, the revenue has no right to impose penalty at rate of 60% against SDI.

ISSUES ON INTEREST EXPENDITURE

[17] The court now turn to the issue whether the interest payable by SDI on

a revolving credit facility for the acquisition of a piece of land and construction of a building is deductible under s 33(1)(a)(ii) of the Act.

[18] According to the SCIT, the said interest did not fit the criteria imposed by s 33(1)(a)(ii) of the Act. This is because, the SCIT found that the factory building was still not in use for year ending 31 March 1997 and 31 March 1998. It was still under construction and no exact date was known when the building started to operate as factory.

[19] For an ease of reference, the relevant provision s 33(1)(a)(ii) of the Act is reproduced:

> (1) Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that *source for that period all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of gross income from that source,* including —
>
> (a) subject to subsection (2), any sum payable for that period or for any part of that period) by way of interest upon any money borrowed by that person and —
>
> (a) employed in that period in the production of gross income from that source; or
>
> (b) laid out on assets *used or held* in that period for the production of gross income from that source; (Emphasis added.)

[20] So reading s 33 of the Act, it is my considered view that only expenses which are 'wholly and exclusively incurred during that period by that person in the production of gross income from that source' are deductible. Being that so, before the interest payable by SDI could be considered as an expenditure under s 33 of the Act, the land and the factory must be used or held to produce the gross income of SDI's business which is trading in galvanised iron steel sheet, for year ending 31 March 1997 and 31 March 1998. Unfortunately, it is not the situation in the present case before me.

[21] In the instant case, both parties are not in dispute on the fact that SDI had obtained a revolving credit facility for the acquisition of a piece of land and construction of a building/factory upon it. However, the facts also show that in year ended 31 March 1997 and 31 March 1998, the land and the building/factory was still not in use for SDI's business purposes. This was because, it was still under construction and there was no exact date given when was the building first started to operate as factory.

[22] In the case of *MP Holdings Sdn Bhd v KPHDN* (2000) MSTC 3, the

taxpayer obtained a loan to finance the purchase of K Estate and claimed the interest to be deducted under s 33 of the Act. In rejecting the claim, the court held:

> K Estate was purchased for housing development. Pending the development, any income from the estate was merely incidental to the principal object of the purchase. Therefore any deduction of interest will only arise when the original intention materialises ie income derived from the housing development in this case.

[23] In the light of the above, I find no circumstances prevailing which warrant this court to disturb the finding of the SCIT on this issue.

CONCLUSION

[24] Based on the reasons above stated, the appeals are dismissed with costs at RM5,000 of each party and the deciding order issued by SCIT is hereby affirmed.

Both appeals dismissed and SCIT's decisions affirmed.

Reported by Ashok Kumar